

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH WAYNE RICH,

Petitioner,

No. CIV S- 05-0892 MCE GGH P

vs.

MATTHEW MARTEL, Warden,¹

ORDER &

Respondent.

FINDINGS AND RECOMMENDATIONS

I. Introduction

Petitioner, proceeding with appointed counsel, has filed a petition pursuant to 28 U.S.C. §2254. Petitioner's November 19, 2007, motion for summary judgment, came on for hearing on December 20, 2007, before the undersigned. Petitioner was represented by Carolyn Wiggin, while David Eldridge appeared for respondent.²

¹ Petitioner's counsel has provided information as to petitioner's present location, substituting Matthew Martel as respondent in place of Roseanne Campbell.

² Respondent had failed to file any response to the motion and had therefore lost the privilege to speak in opposition to the motion at the hearing. See Local Rule 78-230(c). Nevertheless, respondent's counsel was directed to appear at the aforementioned hearing and to show cause for respondent's omission and why summary judgment should not be entered for petitioner based on the wholesale default. See Order, filed on December 18, 2007.

At the hearing, respondent's counsel apologized and explained that respondent's prior counsel in this matter, along with a number of other counsel from the Attorney General's Office,

Petitioner pled guilty in Tehama County Superior Court, on October 17, 2001, to five counts of various sex crime charges: count 2 - forcible rape on or about October 1993, Cal. Pen. Code § 261(a)(2); count 3 - lewd and lascivious act upon a 14-year-old victim on or about July, 1992, through May 8, 1993, Cal. Pen. Code § 288(c)(1) ; count 4 - lewd and lascivious act upon a 15-year-old victim on or about May 9, 1993, through May 8, 1994, Cal. Pen. Code § 288(c)(1); count 5 - forcible genital and anal penetration by use of a foreign object for sexual gratification on or about July, 1992, through May 8, 1993, Cal. Pen. Code § 289(a)(1); and count 8 - oral copulation on or about May 9, 1994, through May 8, 1995, with a 16-year-old victim, Cal. Pen. Code § 288a(b)(1). Second Amended Petition (SAP) at 1-2, 6-7. Petitioner was sentenced to a total aggregate term of 20 years and four months. SAP at 8; Answer at 1.

Petitioner raises one ground in his second amended petition: Trial court violated petitioner's Sixth and Fourteenth Amendments rights, as discussed in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004)), by imposing an upper-term sentence. SAP at 5. The answer was filed before the decision was rendered in Cunningham v. California, 549 U.S. 270, 127 S.Ct. 856 (2007).

II. AEDPA

The Antiterrorism and Effective Death Penalty Act (AEDPA) applies to this petition for habeas corpus which was filed after the AEDPA became effective. Neelley v. Nagle, 138 F.3d 917 (11th Cir.), citing Lindh v. Murphy, 521 U.S. 320, 117 S. Ct. 2059 (1997). The

had recently retired, and that the matter fell through the cracks at least in part due to the turnovers and a staff shortage. The court noted also that respondent's present counsel had not even filed a notice of an appearance in this matter until after the dispositive motion was filed, indicating that petitioner's omission was inadvertent. When petitioner contended that counsel for respondent could have sought an extension of time and argued that respondent should not be heard on the merits, the undersigned pointed out that the Local Rule cited above leaves it to the court's discretion to hear the opposing party who fails to file a written opposition timely, but that counsel's failure to file written opposition is not a default, as it may be deemed to be when a pro se litigant fails to oppose. At the hearing, the undersigned observed the matter must be decided correctly and the assistance of the Attorney General would be useful. Therefore, the show cause order will be deemed discharged.

1 AEDPA “worked substantial changes to the law of habeas corpus,” establishing more deferential
2 standards of review to be used by a federal habeas court in assessing a state court’s adjudication
3 of a criminal defendant’s claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263
4 (9th Cir. 1997).

5 In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme
6 Court defined the operative review standard set forth in § 2254(d). Justice O’Connor’s opinion
7 for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy
8 between “contrary to” clearly established law as enunciated by the Supreme Court, and an
9 “unreasonable application of” that law. Id. at 1519. “Contrary to” clearly established law applies
10 to two situations: (1) where the state court legal conclusion is opposite that of the Supreme
11 Court on a point of law, or (2) if the state court case is materially indistinguishable from a
12 Supreme Court case, i.e., on point factually, yet the legal result is opposite.

13 “Unreasonable application” of established law, on the other hand, applies to
14 mixed questions of law and fact, that is, the application of law to fact where there are no factually
15 on point Supreme Court cases which mandate the result for the precise factual scenario at issue.
16 Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the
17 AEDPA standard of review which directs deference to be paid to state court decisions. While the
18 deference is not blindly automatic, “the most important point is that an *unreasonable* application
19 of federal law is different from an incorrect application of law....[A] federal habeas court may not
20 issue the writ simply because that court concludes in its independent judgment that the relevant
21 state-court decision applied clearly established federal law erroneously or incorrectly. Rather,
22 that application must also be unreasonable.” Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at
23 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the
24 objectively unreasonable nature of the state court decision in light of controlling Supreme Court
25 authority. Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

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1 The state courts need not have cited to federal authority, or even have indicated
 2 awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S.
 3 Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is
 4 contrary to, or an unreasonable application of, established Supreme Court authority. Id. An
 5 unreasonable error is one in excess of even a reviewing court's perception that "clear error" has
 6 occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 1175 (2003). Moreover, the
 7 established Supreme Court authority reviewed must be a pronouncement on constitutional
 8 principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules
 9 binding only on federal courts. Early v. Packer, 537 U.S. at 9, 123 S. Ct. at 366.

10 However, where the state courts have not addressed the constitutional issue in
 11 dispute in any reasoned opinion, the federal court will independently review the record in
 12 adjudication of that issue. "Independent review of the record is not de novo review of the
 13 constitutional issue, but rather, the only method by which we can determine whether a silent state
 14 court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir.
 15 2003).

16 III. Procedural/Factual Background

17 The unpublished 2004 Third District Court of Appeal opinion accurately sets forth
 18 the procedural history of this case:

19 This is the second appeal by defendant Kenneth Wayne Rich from
 20 his convictions for committing various sexual offenses against his
 21 young daughter. (See People v. Rich (June 19, 2001, C035535)
 [nonpub. opn.]; we take judicial notice (Evid.Code, § 452, subd.
 (d)) of this court's records in defendant's first appeal.)

22 In December 1999, defendant was charged with 18 sexual offenses.
 23 He entered negotiated pleas of guilty to nine of them (counts I-VI,
 24 VIII, X, XII), the remaining counts were dismissed, and he was
 sentenced to a state prison term of 30 years 4 months. (People v.
Rich, supra, C035535.)

25 Defendant appealed, arguing the judgment must be reversed
 26 because the offenses described in the information were facially
 barred by the statute of limitations and he had not personally

1 waived the limitation period. (See People v. Williams (1999) 21
2 Cal.4th 335, 338, 344.) (People v. Rich, supra, C035535.)
3 This court reversed the judgment and issued the following
4 disposition: “[T]he matter [is] remanded to the superior court for a
5 determination whether facts exist removing each count from the
6 applicable limitation period. If such facts exist, the superior court
7 shall reinstate the convictions and resentence defendant. If any
8 count is not so removed, and defendant does not waive the
9 limitations period, the People, having been deprived of the benefit
10 of the plea [agreement], must be afforded the opportunity to have
11 the [plea] set aside and to proceed on any timely charges, including
12 those previously dismissed.” (People v. Rich, supra, C0355350.)

13 At an evidentiary hearing upon remand, the People sought to prove
14 that five of the nine charges to which defendant had pled guilty
15 (counts II-V and VIII) were timely pursuant to Penal Code section
16 803, subdivision (g) (hereafter section 803(g); further section
17 references are to the Penal Code unless otherwise specified.)
18 Section 803(g) permits prosecution of specified sexual offenses
19 against children after the statute of limitations has expired if (1)
20 prosecution is commenced within one year of the victim reporting
21 the abuse to law enforcement, (2) the offense involved substantial
22 sexual conduct, and (3) there is independent evidence that clearly
23 and convincingly corroborates the victim's allegation.

24 At the conclusion of the hearing, the superior court dismissed
25 counts I, VI, X, and XII, but found the following were not
26 time-barred: count II, forcible rape (§ 261, subd. (a)(2)); counts III
and IV, lewd acts with a child 14 or 15 years of age with the
offender being 10 years older than the victim (§ 288, subd. (c)(1));
count V, forcible penetration by a foreign object (§ 289, subd.
(a)(1)); and count VIII, oral copulation (§ 288a, subd. (b)(1)). The
court sentenced defendant to state prison term of 20 years 4
months.

Defendant appeals again, contending (1) the superior court was
prohibited from proceeding with an evidentiary hearing because the
People failed to amend the information to allege that the statute of
limitations was extended by section 803(g), (2) the court's findings
on the applicability of section 803(g) must be reversed because
defendant did not personally waive a jury trial on this issue, (3) the
evidence adduced at the evidentiary hearing in support of counts II
through V is insufficient to corroborate the victim's testimony, and
(4) errors in the abstract of judgment must be corrected and the
imposition of certain fines must be stricken. In supplemental letter
briefs, defendant contends (1) as originally enacted, section 803(g)
was not retroactive and, therefore, could not revive the offenses
charged in counts III and IV because they were committed before
the statute's effective date, and (2) the court erred in imposing the
upper term on counts II, III and V, and a consecutive sentence for
counts IV and VIII because in doing so, the court relied upon facts

1 not submitted to a jury and proved beyond a reasonable doubt.
2 We conclude that errors in the abstract of judgment must be
3 corrected and that certain fines must be stricken. Otherwise, we
4 shall affirm the judgment.

5 MSJ, Exhibit (Exh.) K, 2004 Cal. App. Unpub. Lexis 10519; Respondent's Lodged Document 6,
6 pp. 1-4; People v. Rich, 2004 WL 2601678 *1-2 (Cal. App. Nov. 17, 2004).

7 The state appellate court set forth the factual underpinnings of the case as
8 adduced at the evidentiary hearing held in the superior court on resentencing:

9 At the evidentiary hearing, the victim testified that she was born on
10 May 9, 1978, and that defendant, who is her father, began
11 molesting her when she was four years old and continued doing so
12 until she was 21. They moved to Tehama County from Missouri in
13 July 1992, when she was 14. According to the victim, she orally
14 copulated defendant and he orally copulated her when she was 14
15 and 15 years old, and these acts occurred "roughly ... once, maybe
16 twice a week," until she was 18 years old. When the court asked
17 the victim if a year ever went by when there was no oral
18 copulation, she replied, "Never."

19 Defendant first had sexual intercourse with the victim in October
20 1993, when she was 15 years old. He got on top of her, held her
21 hands, and when she started to scream, he put a pillow over her
22 head. He then "shoved it in" or "jabbed it in [her]." The sheets
23 were bloody when he had finished, and he told her to clean up the
24 mess. As a result of the intercourse, the victim became pregnant
25 and gave birth to the child in July 1994, when she was 16.

26 When the victim was 16 or 17, defendant videotaped an act of
sexual intercourse and oral copulation with her, and the videotape
showed defendant holding down her arms and legs. Her mother,
who saw the tape and testified that it depicted acts of intercourse
and oral copulation, destroyed the tape before the hearing.

*7 The victim also testified that defendant "used a dildo on [her]"
from "14 [years of age] on up," and that the dildo, which was a
cream color, was stored in a trash bag and kept in a box in the back
of a drawer in a nightstand by her mother's side of the bed. The
victim's mother verified that she kept an "off-white or pink" dildo,
wrapped in a trash bag, in the back of a drawer in a nightstand by
her side of the bed. Investigating officers confirmed that they found
a penis shaped dildo wrapped in a garbage bag in a drawer of a
nightstand in the bedroom belonging to defendant and the victim's
mother. After the officers left, the mother threw the dildo away.

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Prior to defendant's arrest, the victim telephoned him and the call was recorded and monitored by the police.³ On the tape recording, defendant admitted he began molesting the victim when she was 6 or 7, and admitted fathering her child and "having sex" with her on a frequent basis since she was 14. When the victim accused defendant of using force to have intercourse and described the incident with the pillow, he claimed that he did not remember doing such a thing and that he "would have never done anything to hurt [her]."

During the recorded telephone conversation, the victim asked defendant if he remembered an occasion when they lived in Missouri, and he said, "Hey, if you give me a blow job, I will stop this." Defendant replied, "Yep," and explained that he had tried to stop but "I don't know, I just got weak." He also did not deny he told the victim, "If you let me have intercourse with you, if you let me stick it in you, I'll stop." He did not stop, however, because he thought the victim had changed her mind and "liked it."

MSJ, Exh. K; respondent's Lodged Doc. 6, pp. 14-16; People v. Rich, 2004 WL 2601678 at *6-7.

IV. Motion for Summary Judgment

Petitioner moves for summary judgment on the ground that petitioner's sentence violates his Sixth Amendment right to have facts increasing his sentence proved to a jury beyond a reasonable doubt, citing Apprendi v. New Jersey, 530 U.S. 466, 488-90 (2000); Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531 (2004); Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856. Motion for Summary Judgment (MSJ), pp. 8-9. In Cunningham, *supra*, 127 S. Ct. at 860, decided on January 22, 2007, the High Court held that California's determinate sentencing law (DSL) violates a defendant's jury trial right under the Sixth and Fourteenth Amendments "by placing sentence-elevating factfinding within the judge's province."

Petitioner appears to have moved for summary judgment on the sole ground raised in the petition to speed the resolution of this matter in the belief that petitioner is entitled to imminent release. MSJ, p. 10.

³ See respondent's Lodged Doc, CT, People's Exh. 1, stamped "Received Dec 28 1999."

At oral argument on this motion, it was noted that the Ninth Circuit had not yet ruled whether Cunningham's application is retroactive. At the hearing, petitioner pressed the point that the claim had been initiated as a Blakely claim. Very recently, in Butler v. Curry, 2008 WL 2331440, No. 07-56204, 6429, 6433 (9th Cir. June 9, 2008)(slip op.),⁴ petitioner's position has been vindicated by the Ninth Circuit's clarification that the Cunningham decision, striking down California's determinate sentencing law (DSL), was compelled by Blakely, such that the decision as to whether petitioner's constitutional rights herein were violated rests, as a threshold matter, on whether or not his conviction became final before Blakely, not Cunningham, was decided. Citing Teague v. Lane, 489 U.S. 288, 306, 109 S. Ct. 1060, the Ninth Circuit panel states flatly:

Apprendi, Blakely, and Booker made "courts throughout the land" aware that sentencing schemes that raise the maximum possible term based on facts not found by a jury violate the constitutional rights of defendants. *Id.* at 306. No principles of comity or federalism would be served by refusing to apply this rule to functionally indistinguishable state sentencing schemes on collateral review. *Cunningham* thus did not announce a new rule of constitutional law and may be applied retroactively on collateral review.

Butler, *supra*, at *10.

In this case, no party disputes that petitioner's conviction became final on May 24, 2005, ninety days after the state supreme court denied his petition for review on direct appeal, filed on February 23, 2005.⁵ Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) ("holding] that the period of 'direct review' in 28 U.S.C. § 2244(d)(1)(A) includes the [ninety-day] period within which a petitioner can file a petition for a writ of certiorari with the United States Supreme Court, whether or not the petitioner actually files such a petition.") The record indicates that petitioner filed a supplemental letter brief with his appeal before the Third District

⁴ Although the court had taken note of the ruling, petitioner's counsel, on June 11, 2008, in a supplemental filing, sought to assure that the new ruling was herein considered.

⁵ See respondent's Lodged Document 8.

1 Court of Appeal, pursuant to a general order of the state appellate court, in light of Blakely,
 2 which was decided on June 24, 2004, to which respondent filed a supplemental brief in
 3 opposition. See respondent's Lodged Document Nos. 2 & 4. Moreover, the portion of the
 4 appellate court decision cited above indicates that the court considered petitioner's appeal of his
 5 resentencing in light of Apprendi and Blakely. Thus, there can be no question of the applicability
 6 of Apprendi, Blakely and, in light of Butler v. Curry, of Cunningham to the instant case.

7 Looking at the pre-Cunningham cases which led to the conclusion
 8 that the California DSL "squarely violated" the Sixth Amendment, the Ninth Circuit summarizes:

9 First in the line of pertinent cases was Apprendi v. New Jersey, 530
 10 U.S. 466 (2000), which held that " 'any fact (other than prior
 11 conviction) that increases the maximum penalty for a crime must
 12 be charged in an indictment, submitted to a jury, and proven
 13 beyond a reasonable doubt.' " *Id.* at 476 (quoting Jones v. United
 14 States, 526 U.S. 227, 243 n.6 (1999)). Next, Blakely v.
 15 Washington, 542 U.S. 296 (2004), clarified that "the 'statutory
 16 maximum' for Apprendi purposes is the maximum sentence a
 17 judge may impose solely on the basis of the facts reflected in the
 18 jury verdict or admitted by the defendant" and reaffirmed
 19 Apprendi's "bright-line rule." *Id.* at 303 (emphasis in original).
 20 Finally, United States v. Booker, 543 U.S. 220 (2005), held that the
 21 Federal Sentencing Guidelines were invalid because, as in Blakely,
 22 " 'the jury's verdict alone does not authorize the sentence. The
 23 judge acquires that authority only upon finding some additional
 24 fact.' " *Id.* at 235 (quoting Blakely, 542 U.S. at 305). Taken
 25 together, Apprendi, Blakely, and Booker, firmly established that a
 26 sentencing scheme in which the maximum possible sentence is set
 based on facts found by a judge is not consistent with the Sixth
 Amendment.

20 Butler, *supra*, at 644.

21 Petitioner contends there is no dispute as to the material facts in this case. MSJ,
 22 pp. 2-5. The record indicates that when, on March 14, 2000, petitioner pled guilty to nine counts
 23 of an 18-count indictment, he received a warning that the maximum, or "upper term," sentence to
 24 which he was subject was 30 years and four months. MSJ, at 2.

25 The Court: Do you understand that the maximum sentence for the
 26 offenses to which you are entering a plea of guilty to, which would
 be Counts I, II, III, IV, V, VI, VIII, X, XII, is 30 years four months

1 in State Prison and a fine of up to \$100,000?

2 The Defendant: Yes.

3 MSJ, Exh. C, and respondent's Lodged Reporter's Transcript (RT), Certified Plea, March 14,
4 2004, p. 6. See also, MSJ, Exh. B, petitioner's signed "Acknowledgment of Rights and
5 Defendant's Waiver for Entry of Guilty Plea," and dated March 14, 2000. Petitioner asserts
6 accurately, however, as far as it goes, that he was not told whether he would receive a lower,
7 middle or upper term sentence. MSJ at 2-3, Exh. C, RT 3-11. He also states as an undisputed
8 fact (# 2) that the parties did not stipulate to aggravating factors; nor was there a narration of the
9 relevant facts. MSJ, Statement of Undisputed Facts (SUF), Exh. B; respondent's Lodged Doc,
10 RT, Certified Plea. Petitioner concedes that the parties did stipulate to a factual basis for the
11 counts to which petitioner pled guilty, averring that there was no stipulation to the existence of
12 aggravating factors. MSJ, at 3.

13 The Court: Is there a factual basis to the plea?

14 [Defendant's Counsel]: Your Honor, there is. We would stipulate
15 that there is a factual basis for some counts. Additionally, this
16 would be a People vs. West plea as to other counts. My client does
17 not wish to contest those counts.

18 The Court: And is that acceptable to the People?

19 [The Prosecutor]: We will stipulate to a factual basis on all counts,
20 Your Honor.

21 MSJ, Exh. C, RT 8.

22 Following the April 17, 2000, sentencing to a term of 30 years and four
23 months (MSJ, SUF # 3, Exh. D, CT; Abstract of Judgment; respondent's Lodged Doc., RT for
24 4/17/00), on appeal, according to petitioner, the state appellate court simply vacated the
25 conviction and sentence because each of the counts to which petitioner had pled were found to be
26 beyond the applicable statute of limitations. MSJ, p. 3, Exh. F, June⁶ 19, 2001, first Third

⁶ Petitioner erroneously references the decision as dated July 19, 2001.

1 District Court of Appeal decision. However, the court actually stated that the judgment was
2 reversed and the matter remanded for a hearing for the lower court to determine “whether facts
3 exist removing each count from the applicable period.” MSJ, Exh. F, p. 6.

4 If such facts exist, the superior court shall reinstate the convictions
5 and resentence defendant. If any count is not so removed, and
6 defendant does not waive the limitation period, the People, having
7 been deprived of the benefit of the plea bargain, must be afforded
8 the opportunity to have the bargain set aside and to proceed on any
9 timely charges, including those previously dismissed.

10 Id.

11 On remand, following an evidentiary hearing, at which, inter alia, the victim,
12 petitioner’s daughter and his wife testified, five of the counts were reinstated and petitioner was
13 resentenced on October 17, 2001:

14 Count 2 (Forcible rape on or about October 1993, California Penal
15 Code Section 261(a)(2)): court sentenced Mr. Rich to the upper
16 term of eight years.

17 Count 3 (Lewd and lascivious act upon a 14-year-old victim on or
18 about July, 1992, through May 8, 1993, California Penal Code
19 Section 288(c)(1)): court designated this as the principal term
20 per California Penal Code Section 1170.1 and imposed the upper
21 term, three years.

22 Count 4 (Lewd and lascivious act upon a 15-year-old victim on or
23 about May 9, 1993, through May 8, 1994, California Penal Code
24 Section 288(c)(1)): court sentenced Mr. Rich to the middle term,
25 three years, to be served consecutively at one-third the
26 mid-term, eight months.

Count 5 (Forcible genital and anal penetration by use of a foreign
object for sexual gratification on or about July, 1992, through
May 8, 1993, California Penal Code Section 289(a)(1)): court
imposed the upper term of eight years, to be served consecutively.

Count 8 (Oral copulation on or about May 9, 1994, through May 8,
1995, with a 16-year-old victim, California Penal Code Section
288a(b)(1)): court sentenced Mr. Rich to the middle term of three
years, to be served consecutively at one-third the mid-term, eight
months.

MSJ, pp. 3-4, Exh. F, at 3-4, Exh. H, Exh. I, 10/17/01, CT, Criminal Minutes/Abstract of

Judgment, Exh. J, RT for 10/17/01 resentencing; respondent's Lodged Doc. RT for hearing on 10/15/01 and resentencing on 10/17/01. Petitioner avers that he was not granted the opportunity to determine "anew whether or not he wanted to plead guilty." MSJ, p. 3, SUF # 6.

Petitioner is correct that petitioner received a new sentence of 20 years and four months, which included a sentence of two consecutive eight-year upper terms, pursuant to Cal. Penal Code § 667.6(d) and that he received those terms based on the court's finding that "factors in aggravation outweigh those in mitigation." MSJ, SUF #s 6-7, citing Exhs. I & J, CT and RT & respondent's Lodged Docs. CT 10-13, RT 66-72.

The Court finds the following factors in aggravation outweigh those in mitigation. These factors apply to all counts. The victim was particularly vulnerable. The commission of the crimes indicate planning in that they are committed only at times which would prevent detection, and because of the multiplicity of crimes they would have to involve planning. The crimes involved a high degree of viciousness, cruelty and callousness in that the victim was the Defendant's own minor daughter, who resided in the home.

MSJ, Exh. J & respondent's Lodged Doc., RT, p. 69. There is no dispute that, as noted earlier, Third District Court of Appeal affirmed the conviction and the California Supreme Court denied the petition for review. MSJ, SUF # 8, Exhs. K & L; respondent's answer & Lodged Docs. 6 & 8.

In his supplemental letter brief on appeal, petitioner made the claim that:

The imposition of aggravated terms based on circumstances in aggravation as determined by the court violated appellant's Sixth Amendment rights, as defined by the Apprendi/Blakely doctrine.

MSJ, p. 4, respondent's Lodged Doc. # 2, p. 2.

In rejecting that claim, the state appellate court reasoned:

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in Apprendi v. New Jersey (2000) 530 U.S. 466 [147 L.Ed.2d 435] (hereafter Apprendi) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) For this purpose, the statutory maximum is the

1 maximum sentence that a court could impose based solely on facts
 2 reflected by a jury's verdict or admitted by the defendant. Thus,
 3 when a sentencing court's authority to impose an enhanced
 sentence depends upon additional fact findings, there is a right to a
 jury trial and proof beyond a reasonable doubt on the additional
 facts.

4 (Blakely v. Washington (2004) 542 U.S. 296, ---- [159 L.Ed.2d
 403, 413-414] (hereafter Blakely).)

5 Relying on Apprendi and Blakely, defendant claims the superior
 6 court erred in imposing the upper term on counts II, III and V, and
 a consecutive sentence on counts IV and VIII. The contention fails.
 7 Plea bargaining is a judicially and legislatively recognized
 procedure (People v. Masloski (2001) 25 Cal.4th 1212, 1216;
 8 Pen.Code, § 1192.5) that provides reciprocal benefits to the People
 and the defendant. (People v. Orin (1975) 13 Cal.3d 937, 942.)

9 When, as part of a plea agreement, a defendant specifies the
 maximum sentence that may be imposed, he necessarily admits
 10 that his conduct is sufficient to expose him to that punishment and
 reserves only the exercise of the trial court's sentencing discretion
 in determining whether to impose that sentence. (See People v.
 11 Hoffard, supra, 10 Cal.4th at pp. 1181-1182.) The decisions in
 12 Apprendi and Blakely do not preclude the exercise of discretion by
 a sentencing court so long as the sentence imposed is within the
 13 range to which the defendant was exposed by his admissions. Such
 is the case here. Defendant's plea in effect admitted the existence
 14 of facts necessary to impose the upper terms and consecutive
 sentences.

15
 16 MSJ, Exh. K; respondent's Lodged Doc. 6, pp. 22-23; People v. Rich, 2004 WL 2601678 *10.

17 The decision of the Third District Court of Appeal is the last reasoned decision in
 18 this case as to, inter alia, the instant claim and thus it is the one to be looked to under §
 19 2254(d)(1) "as the basis for the state court's judgment." Polk v. Sandoval, 503 F.3d 903, 909 (9th
 20 Cir. 2007).

21 As petitioner points out, the sentencing judge used a preponderance of the
 22 evidence test to make certain findings to impose upper, rather than middle term, sentences.

23 MSJ, p. 9. The Supreme Court, in noting that California's DSL "direct[s] the sentencing court to
 24 start with the middle term, and to move from that term only when the court itself finds and places
 25 on the record facts-whether related to the offense or the offender-beyond the elements of the
 26 charged offense," has found that:

1 [O]ur decisions from Apprendi to Booker point to the middle term
2 specified in California's statutes, not the upper term, as the
3 relevant statutory maximum. Because the DSL authorizes the
4 judge, not the jury, to find the facts permitting an upper term
5 sentence, the system cannot withstand measurement against our
6 Sixth Amendment precedent.

7 Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 862, 870.

8 Much of the oral argument in this matter has been rendered moot by the holding
9 of Butler v. Curry. Respondent argued that when at the outset petitioner pled guilty and agreed
10 that there was a thirty-year maximum term, that he expected the court to make judicial findings
11 and raised no objection to a jury not being impaneled at sentencing. Conceding that the state
12 appellate court had found no express waiver, respondent noted that that court had found
13 petitioner agreed that he was vulnerable to the maximum term as result of his plea, and that pre-
14 Apprendi, the expectation was that the court would make judicial findings. Petitioner maintained
15 that there was no knowing waiver on sentencing factors or aggravating factors as to his right to a
16 jury trial, only a stipulation to enough facts for the counts of conviction and that state law facts
17 cannot do double duty as aggravating factors. Conceding that theoretically petitioner could have
18 pled guilty to sentencing factors, such was not the case here.

19 Given the record of the sentencing and resentencing in this case, and in light of
20 Cunningham, there can be little doubt that the state appellate court's decision that petitioner's
21 "plea in effect admitted the existence of facts necessary to impose the upper terms and
22 consecutive sentences," where the imposition of the upper terms rested on the lower court judge
23 having found aggravating factors by a preponderance of the evidence, rather than by a jury
24 finding guilt beyond a reasonable doubt as to those factors, was "contrary" to clearly established
25 Supreme Court precedent insofar as the judge, under the DSL, imposed a sentence beyond the
26 statutory maximum recognized by Supreme Court precedent "from Apprendi to Booker."
Cunningham v. California, 549 U.S. 270, 127 S. Ct. at 862, 870; Butler v. Curry, 528 F3d 624
(9th Cir. 2008). Although "under California law, only one aggravating factor is necessary to set

1 the upper term as the maximum sentence,” any such factor must be “established in a manner
2 consistent with the Sixth Amendment,” Butler, supra, 642. Respondent argued that the judge
3 cited as an aggravating factor that the victim was petitioner’s daughter, an indisputable fact, but
4 petitioner asserted that as to that factor, the judge found cruelty and callousness and that is the
5 portion of the aggravating factor finding that violated the Sixth Amendment. Of course, finding
6 that imposition of the upper term sentence violated petitioner’s Sixth Amendment rights does not
7 end the matter.

8 In Butler, supra, 648, citing Washington v. Recuenco, 548 U.S. 212, 126 S.Ct.
9 2546 (2006), the Ninth Circuit panel observed that a sentencing error entitles a petitioner to relief
10 only if the error is not harmless. The Butler Court, id., then goes on to apply the standard set
11 forth in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, (1993), whether “the error had a
12 substantial and injurious effect on [petitioner’s] sentence.”

13 Under that standard, we must grant relief if we are in “grave doubt”
14 as to whether a jury would have found the relevant aggravating
15 factors beyond a reasonable doubt. O’Neal v. McAninch, 513 U.S.
16 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). Grave doubt
exists when, “in the judge’s mind, the matter is so evenly balanced
that he feels himself in virtual equipoise as to the harmlessness of
the error.” *Id.* at 435.

17 Butler, supra, at 648.

18 In conducting a harmless error review of an Apprendi violation, the Ninth Circuit
19 made clear that evidence considered at sentencing proceedings could be considered, while “new
20 admissions made at the sentencing...” are not. Butler, supra, at 648.

21 Apprendi errors are harmless when we can ascertain that a judge
22 was presented with sufficient documents at sentencing-including
23 the original conviction documents and any documents evidencing
24 modification, termination, or revocation of probation-to enable a
reviewing or sentencing court to conclude that a jury would have
found the relevant fact beyond a reasonable doubt. See
Salazar-Lopez, 506 F.3d at 755.

25 Butler, supra, at 647n. 14.

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1 In this case, the court need go no further than the first aggravating factor noted by
2 the judge at resentencing, that “the victim was particularly vulnerable.” MSJ, Exh. J &
3 respondent’s Lodged Doc., RT, p. 69. At a minimum, it is indisputable that the victim was
4 petitioner’s own daughter, and the record before the judge at resentencing contained the
5 information that petitioner regularly molested her from a very young age, at one point
6 impregnating her with a child who, as a tragic product of incest, unsurprisingly suffered a number
7 of developmental deficits. See, e.g., comments made by petitioner’s own counsel at the time of
8 the original sentencing, on April 17, 2000, include the following:

9 Your Honor, my client is the first person to acknowledge that his
10 criminal conduct in this case has destroyed many lives: his
11 daughter, his wife; frankly, his entire family has been essentially
12 destroyed by his criminal activity.
13

14 This is a case where my client chose not to force his daughter, who had
15 already been traumatized in an incredible fashion, to be further
16 traumatized by a public trial where she would have to recount the details
17 of this relationship...
18

19 Certainly over the course of years this was very reprehensible conduct.

20 Respondent’s Lodged Doc., RT, p. 17.

21 The prosecutor contended as follows, at the original sentencing, in
22 arguing for a maximum sentence:

23 Your Honor, I would ask you to try to imagine living with a
24 predator. He is there in the house with you all the time. He is
25 there at the table with you when you eat dinner. He is there when
26 you are at your most vulnerable, when you are in the bathroom,
when you shower, when you sleep. He provides your food,
clothing, your shelter. He is your dad, and you love him no matter
what he does. He is an adult. You are a very young girl. He is
bigger and much stronger than you. Your dad has the power. He
has the power over you. He controls everything that you do and
every place that you go.
.....

27 Kenneth Rich impregnated his daughter with his own child when
28 she was 15. She gave birth at 16. As you might imagine, that child
is not normal. And how is her mother going to answer the

1 questions about who her dad is? How is she going to live with
2 that?

3 Respondent's Lodged Doc., RT, pp. 17-18.

4 The court noted, in imposing the original sentence:

5 Clearly the Defendant perpetrated acts of sexual abuse upon his
6 own daughter for years... The fact of the matter is that the
7 Defendant committed offenses directed towards an innocent victim
repeatedly for years...

8 Respondent's Lodged Doc., RT, pp. 20-21.

9 Under California law, "[t]he 'particularly vulnerable victim' factor supports
10 imposition of the upper term if the victim is vulnerable 'in a special or unusual degree, to an
11 extent greater than in other cases [and is] defenseless, unguarded, unprotected, accessible,
12 assailable ... susceptible to the defendant's criminal act.'" People v. Clark, 50 Cal.3d, 583, 638,
13 268 Cal. Rptr. 399 (Cal. 1990), quoting People v. Smith, 94 Cal.App.3d 433, 436, 156 Cal. Rptr.
14 502 (Cal. App. 4th 1979). Specifically, the California Supreme Court has found the status of a
15 crime victim, where for example, she was dependent on the perpetrator for shelter with "no other
16 apparent place to go," can be found to render a person "particularly vulnerable." People v.
17 Stitely, 35 Cal.4th 514, 575, 26 Cal.Rptr.3rd 1, (Cal. 2005) ("a crime victim can be deemed
18 vulnerable in this context for reasons not based solely on age, including the victim's relationship
19 with the defendant and his abuse of a position of trust.") It is difficult to conceive of a more
20 egregious abuse of trust than that committed by a father in sexually victimizing his natural child,
21 here, a daughter, living in his house, dependent on him for her survival and well-being both
22 physically and emotionally.

23 Far from being left in "grave doubt" that, under the circumstances of this case
24 a jury would have found, beyond a reasonable doubt, the aggravating circumstance that this
25 victim was particularly vulnerable, the court is left in virtually no doubt at all.

26 \\\

1 “After one aggravating factor was validly found, the trial court legally *could* have
2 imposed the upper term sentence.” Butler, supra. Therefore, the undersigned finds that the
3 Apprendi/Blakely error was harmless and will recommend denial of the dispositive motion and
4 the habeas petition.

5 Accordingly, IT IS ORDERED that:

6 1. The Clerk of the Court is to substitute Matthew Martel in place of Roseanne
7 Campbell as respondent warden in this action; and

8 2. The show cause order, filed on December 18, 2007 (# 30), is discharged.

9 IT IS RECOMMENDED that both petitioner’s motion for summary judgment,
10 filed on November 19, 2007 (# 28), which came on for hearing on December 20, 2007, and the
11 habeas petition be denied.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
14 days after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Such a document should be captioned
16 “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections
17 shall be served and filed within ten days after service of the objections. The parties are advised
18 that failure to file objections within the specified time may waive the right to appeal the District
19 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

20 DATED: 07/17/08

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

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